thing that he has received under the contract. *Miner* v. *Bradley*, 22 Pick. (Mass.) 457. Rescission terminates the contract, and the obligation then resting on the other party is that of restitution *in specie* or in value. KEENER, QUASI-CONTS., 286. If the measure of damages in the principal case is based on this quasi-contract, the plaintiff, on being required to return all benefits received, should have recovered only the actual value of the materials furnished. The court, however, allowed him to recover the contract price and damages for the breach. In the quasi-contractual action after rescission neither damages for breach nor the contract price as such ought to be recovered; for the action has no relation whatever to the express contract. The price fixed by the contract would merely be evidence of the actual value. KEENER, *supra*, 289.

If the measure of the plaintiff's recovery is the damage sustained by breach of the express contract it is more difficult to see how the deferred payments can be said to be due before the time fixed by the contract. See *Miller* v. *Wilson*, 24 Pa. St. 114. Breach by one party and refusal by the other to proceed does not put an end to the contract. It still exists, but the injured party has an excuse for future non-performance. 14 HARV. L. REV. 425. The injured party has as yet suffered no damage as to the future payments, nor is he deprived of his action for them when they shall be due. The contract is indivisible, and the breach being material, the question is entirely one of damages. In cases where the present complete payment does not impose on the party in default too great a hardship there would seem to be strong grounds of expediency in favor of concluding the whole matter in one action. Moreover, in jurisdiction recognizing the doctrine of anticipatory breach as justifying full recovery at once, the breach may sometimes be construed as a repudiation of the future obligation.

A MORTGAGOR AS SURETY FOR HIS ASSIGNEE. — There is some difference of opinion as to the rights and relations of the interested parties where the purchaser of land from a mortgagor assumes the mortgage debt. Two late cases are of interest as involving these relations. In one the mortgagee agreed with the buyer to extend the time of the mortgage. After this time had elapsed he sued the mortgagor on his original covenant, and was allowed to recover since the mortgagor's remedies were not actually impaired when he had occasion to use them. *Forster* v. *Ivey*, 21 Can. L. T. 550. In the other case, the land failing to satisfy the mortgage debt on foreclosure, the mortgagee obtained judgment against the mortgagor for the balance. The latter sued in equity to force his assignee to perform his promise to pay, and was refused relief, and left to his remedy at law. *Thompson* v. *Lodge*, 58 Leg. Intell. 428 (Phila. Co.). Now what is the relation between the mortgagor and the buyer? As between themselves the assignee is usually regarded as the principal for whom the mortgagor is the surety. *Poe* v. *Dixon*, 60 Oh. St. 124. Although, as will be pointed out later, it seems that a true case of suretyship does not exist, a very similar relation is created. Certainly the buyer is expected to pay the debt, and the mortgagor is to pay only on his default. If the mortgagor pays he is entitled to a transfer of the premises from the mortgagee, to whose rights he is subrogated, and he can foreclose the mortgage or recover over against his assignee on the latter's promise to pay the debt. *Hart* v. *Chase*, 46 Conn. 207. As to the buyer then, he has the rights of indemnity and subrogation, which be-

long to a surety. Now a surety can in equity force his principal to pay the debt. *Bishop* v. *Day*, 13 Vt. 81. Every reason for allowing such a suit appears to apply with equal force here. Clearly the legal remedy is inadequate. Consequently it is not easy to uphold the Pennsylvania case. It is true that there is a state statute on which the case may be supported, but on this the court did not rely.

As to the Canadian case it is necessary to look further. Is the mortgagor a surety of his purchaser as to the mortgagee? At once it appears that under ordinary principles of contracts there is no principal legal obligation from the purchaser to the mortgagee, and so the purchaser can never be in default to the mortgagee. Although the latter can reach the obligation of the purchaser in equity, he has no rights against him at law, except under the anomalous doctrine that the beneficiary of a promise may sue. See 14 HARV. L. REV. 462; 12 HARV. L. REV. 139. Consequently, as to him it seems there is no real suretyship. It is true that if one of two joint debtors, by an arrangement with the other, becomes simply a surety for him, the creditor with notice of this is bound just as if the two were originally principal and surety, and any giving of time to the principal discharges the surety. *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586. But in that case there is an actual primary liability on the other debtor still existing. In the case under consideration it may be said that after notice the creditor should look first to the land and its owner for his debt. But the creditor has never agreed to accept the land as his primary debtor. It seems then that though a very similar relation exists, there is not a true suretyship. Nevertheless most of the cases have been decided as if there were a true case of suretyship, either to the extent of the whole debt, if the buyer promised to pay, or to the extent of the value of the land, in the absence of an express promise, and so the mortgagor has been held discharged to this amount by the slightest giving of time to the purchaser. *Commercial Bank* v. *Wood*, 56 Mo. App. 214; *Travers* v. *Dorr*, 60 Minn. 173; *Murray* v. *Marshall*, 94 N. Y. 611. See, *contra*, *Corbett* v. *Waterman*, 11 Ia. 86. Certainly the same injury to the mortgagor results from the giving of time as would result to a surety, for the creditor has similarly barred his own rights, and so, in the principal case, cannot transfer the right to foreclose to the mortgagor if he makes payment. It is true that at first sight there is no very evident equity in discharging one who suffers no damage. It is submitted, however, that the rule as to discharge by giving time is merely part of the broader rule that any variation of the surety's risk which may injure him to an amount that cannot at the time be ascertained discharges him. This rule has been found necessary to protect the surety, and seems no less necessary to the protection of the mortgagor; nor does the partial difference between the positions of the two suggest any reason for a distinction in this respect. But see *Denison University* v. *Manning*, 61 N. E. Rep. 706 (Ohio). The Canadian decision, therefore, in refusing to follow the rule of suretyship, seems unfortunate.

THE EXTENT OF THE POWER OF EMINENT DOMAIN. — A suggestion as to the purposes for which the power of eminent domain may be constitutionally exercised is furnished by a recent case in the Indian Territory. *Tuttle* v. *Moore*, 64 S. W. Rep. 585 (I. T., C. A.). An Act of Congress,